

BASIC INFORMATION CONCERNING H-1B IMMIGRATION STATUS
related to University of Tennessee (Knoxville area employees)
(Updated April 2016)

Department Heads: Please read this information before signing an H-1B Request.

Overview of H-1B Status

H-1B, or **Temporary Worker**, nonimmigrant status may be granted to a non-U.S. resident who has been offered a professional-level position in the United States. In order for a person to obtain H-1B status, the prospective employer must file a petition with the U.S. Department of Homeland Security/ U.S. Citizenship and Immigration Services (**USCIS**) . After receiving a formal request (and attached documents) from the hiring department, the UTK Center for International Education [CIE] files all official H-1B requests for The University of Tennessee (Knoxville area) with the U.S. Department of Labor (**DOL**) and USCIS. **It is very important for the Department Head to understand the U.S. laws and regulations related to an H-1B status before submitting an H-1B Request to the UTK Center for International Education.**

To initiate a petition:

If a UTK department wants the Center for International Education to file an H-1B petition for a current or prospective employee, it should contact CIE to discuss or add the employee's name to the processing list before H-1B request forms are completed.

General Information

H-1B or Temporary Worker status is appropriate when a non-U.S. resident is employed in a professional position by The University of Tennessee. (Note: although both the permission to stay in the U.S. and the employment authorization granted by USCIS to a person with H-1B status are temporary, the actual position filled by the employee may be a permanent one.)

In some cases, J-1 (Visiting Scholar), O-1 (Person of Extraordinary Ability), TN (for citizens of Canada or Mexico) or E-3 (for citizens of Australia) status may be used instead of H-1B. It may also be possible to employ a nonimmigrant who has employment authorization, usually documented by a plastic Employment Authorization Document (EAD). (Example: F-1 students with Practical Training [OPT] authorization). The University of Tennessee may **not** employ a person (or continue to employ) who is not a U.S. citizen or Legal Permanent Resident and does not have some form of work authorization. A person not authorized to work may not "volunteer" in a position which is normally paid. Contact CIE to discuss possible alternatives to H-1B.

Requesting an H-1B Petition

Before a person may be granted H-1B status, the employer must file a petition with USCIS. In filing this petition, the employer certifies its commitment to employ the person in a specific job and to pay a stated salary. For UTK/UTIA (and other Knoxville area) employees, the Center for International Education (CIE) will complete the H-1B petition and submit it to USCIS. There are, however, a number of requirements which must be fulfilled before this petition can be filed. The process begins in the hiring department, which is responsible for completing an H-1B Request form and the Actual Wage Calculation, getting signatures from relevant Dean's office, gathering other necessary materials, and submitting them all to CIE in one package. The Export Control Form must also be completed and signed and sent directly to the Export Control Officer listed on the form. (See separate instruction sheets and attached checklist for detailed instructions).

Please be aware that the H-1B application can take much longer than you may expect. It is important to begin this process as soon as possible. Prospective employees should be aware that they may not be able to work immediately, and should make arrangements to maintain another legal status, if relevant.

It is important to have a clear understanding of the requirements and liabilities related to an H-1B petition before signing a request form; Information concerning these requirements is given below. ***The H-1B process should begin only after an official job offer has been made.*** (If time is extremely limited, contact CIE to discuss possible shortcuts.) If there are any questions or concerns about H-1B status, the application procedure, or the financial commitment and liabilities for the hiring department, or, please contact the Center for International Education (865-974-3177) before submitting the request form. Currently, it takes about 3-4 months for CIE to prepare and submit an H-1B petition for USCIS, counting from the time that all materials are received by CIE. (Most of this time involves waiting for responses from the U.S. Government). If we encounter any problems or U.S. Government processing times increase, processing will be delayed. Because of the many steps involved,

the entire H-1B application petition process can take 4-12 months or more. (Times vary greatly depending on the individual situation and the workload of DOL and USCIS.) If the employee is outside the U.S., additional time will be required to obtain a U.S. visa (1-3 months or longer). Note that the processing time can often be reduced if the department pays a \$1225 premium processing fee to USCIS. This reduces the time needed for the USCIS part of the process only. [Note: This is normally not necessary or advised if the employee already has H-1B status. It does not decrease the time needed to process DOL paperwork and prepare the USCIS petition].

Fees

Note that all fees related to the filing of a petition must be paid by the host department, and not paid by, or reimbursed by, the H-1B employee. Current fees are \$325 for each petition; an additional \$500 for the *first petition* filed by UTK; and an additional \$1225 for premium processing, if requested. UT policy does not permit The University to pay fees related to the employee's dependents. CIE does not charge a fee for the preparation of an H-1B petition.

Specific Requirements for H-1B Employment

Before an H-1B petition can be filed, the Center for International Education must file a "Labor Condition Application" (LCA) with the U.S. Department of Labor (DOL). In the LCA, the employer must make the following four attestations:

1. The H-1B employee will be paid at least the "actual wage" for the place of employment (e.g. UTK) or the local "prevailing wage", whichever is greater; that **the employee will be paid for the full period of the petition even if not working**; and that the employee will receive the same benefits as a U.S. employee.
2. The employment of an H-1B worker will not "adversely affect" the working conditions of other, similarly employed, persons at the place of employment.
3. There is no current strike or lockout at the place of employment.
4. A notice of the filing of the LCA has been posted in at least two conspicuous locations at the place(s) of employment. **NOTE: These notices, posted in the hiring department in the UT Human Resources Office, and at any other work location, will include the employee's title and salary.**

Although no documentation needs to be filed with the LCA itself, the employer is required to maintain a file of substantial, detailed, documentation supporting the above attestations (known as the "Public Access File"). This documentation must be available for inspection by any interested party, including the U.S. Department of Labor. The required documentation will be kept in the Center for International Education.

Interpreting such terms as "actual wage", "prevailing wage", and "adversely affected" has been complicated by various interpretations by DOL. The University's interpretation is as follows:

The employee will be considered to be making the "**actual wage**" if he/she will receive at least as much as other comparable (similarly employed and similarly qualified) employees in the same department. If others are not all paid exactly the same amount, the salary of the H-1B worker must be within the range of the others (or above it). Before requesting an H-1B petition, the hiring department must identify a list of "comparable employees" in that department (according to uniform, pre-determined, criteria). **If the H-1B employee will receive a salary lower than all comparable employees, an H-1B petition may not be requested unless the offered salary is increased to the Actual Wage range.** (See instructions included in the Actual Wage Calculation and Certification Form.)

The "**prevailing wage**" will be the average wages of persons similarly employed in the same geographic area, as determined by the U.S. Department of Labor. [Note: DOL law allows the use of other, reliable, wage surveys, if approved by the U.S. Department of Labor. UT, however, will use the DOL figures in most or all cases.]

If it is discovered that the H-1B employee will not be paid at least the "actual wage" and "prevailing wage", The University will not be able to file an LCA or an H-1B petition, and therefore, [in most cases] the person may not be employed.

U.S. law also requires that the H-1B employee be given the same benefits as U.S. persons employed in the same position, in accordance with the normal policies of the employer. **IMPORTANT:** UT policy states that regular employees are eligible for all employee benefits. Except for the rare part-time employees, **most H-1B employees must be employed as regular employees and must receive full employee benefits.**

No changes Permitted in Employment

Because the petition, the LCA and the back-up documentation must all list the employee's exact position title, salary, job description and work location, it is **VITALLY IMPORTANT** that the information provided with the H-1B request be **complete and accurate**. The Center for International Education will be attesting **under penalty of perjury** that the information provided is correct. Submitting inaccurate information with either an LCA or an H-1B petition can result in severe penalties for the employer and/or serious legal problems for the employee. **Once paperwork has been filed with the U.S. Department of Labor and the U.S. Citizenship and Immigration Service, The University will be legally obligated to pay the stated salary.** (A typographical error in information given to the Center for International Education could be disastrous!) Although a salary increase would not violate the H-1B regulations, **UT may NOT make any other substantial change in the employee's duties, dates of employment, title, salary, or location of employment until we have filed a new H-1B petition.**

Multiple Work Locations

Also note that it is important to notify The U.S. Department of Labor and the U.S. Department of Homeland Security if the employee will be working on more than one location. **This includes any work located at Oak Ridge National Laboratory, even when UT is the employer.** If the time spent at another location will be a TOTAL of 30 days or less, and if all travel expenses will be reimbursed by UT, then this travel does not need to be included in the application. But if the employee will accumulate more than 30 days of work at another location, that location does not need to be specifically listed in the petition. Note: CIE will need to obtain a prevailing wage determination for each listed additional location.

Export Control

The U.S. Government wishes to control the transfer of "sensitive technology" to nationals of certain countries. For this reason, it maintains a list of certain technologies considered to be sensitive. If a non-U.S. employee will work with any of these technologies, the employer must obtain an Export Control License. USCIS requires every H-1B petitioner to sign a statement that it has checked the lists of export-controlled technologies before filing the petition. In order to ensure compliance with this attestation, the Department Head and Supervisor must complete and sign an Export Control Attestation Form, listing all accounts to be used to pay the H-1B employee, and certifying whether or not the employee will be exposed to controlled technology. The Attestation Form must then be sent to the appropriate Export Control Officer for additional verification. The Export Control Officer will then forward the certified form to CIE.

Termination and Leave Without Pay

IMPORTANT: Once an employee has obtained H-1B status, based on a petition filed by UT, The University must normally pay the stated wage for the duration of the H-1B petition, **even if the employee is not actually working.** In addition, an H-1B employee who is not working may lose his/her legal status in the U.S. and become subject to deportation. For this reason, it is absolutely essential that funding is secured for the period of time requested in the petition and that both employer and employee agree on the dates of employment to be requested in the petition. **When the employment of an H-1B employee is terminated, the Center for International Education must be notified immediately, using the Departure Notification Form, available on the CIE website.** CIE will then withdraw the H-1B petition and LCA, and UT will no longer have a legal obligation to pay the H-1B employee's salary. In most cases, **H-1B employees may not be placed on leave without pay.** There are some exceptions for employees on FMLA leave, and a few others. (Contact CIE to discuss, before placing an H-1B employee on unpaid leave.) If employment is terminated before the end of the H-1B petition period, The University may be liable for paying full salary (**even if the person is no longer performing services**) until USCIS is notified of the termination.

U.S. immigration law also requires the employer to be responsible for the employee's return travel expenses to his/her home country if employment is terminated by the employer for any reason before the end of the H-1B petition period. This expense would be the responsibility of the hiring department. For these reasons, we ask that a department request an H-1B petition only for the period of time for which funding is secure. If continued funding is obtained, then the university may request an extension of the H-1B status. If there are concerns about making this commitment, please contact CIE before requesting an H-1B petition.

Part-time Employment

Most H-1B employees are employed full time. However, in rare cases, an H-1B employee may be employed part-time if the H-1B paperwork, filed with the U.S. Department of Labor and USCIS states that the employment will be part-time. The application must state the number of hours per week the employee will be employed (this may be stated as a range of hours), and the actual time spent in employment-related activities must remain within the stated range of hours. The salary will be calculated in terms of an hourly salary. **IMPORTANT: The hiring department must keep a daily record of the actual hours worked by each part-time H-1B employee, and must submit this record to the UT Human Resources Office. Part-time H-1B employees, even exempt employees, may NOT work more or less than the hours stated on the daily work record. Because of the difficulty of complying with this requirement for exempt employees, UT does not often file H-1B petitions for part-time employment. Part-time petitions will not be filed for research positions.**

Time Limit

Each H-1B petition can be filed for up to three years. The maximum period of time for a person to hold H-1B status is normally **six years**. This includes time spent with previous employers, unless the person has been outside the U.S. for one year before coming to UT. There is no minimum period of time for an H-1B petition. If the employee has a pending application for permanent residence, the H-1B status may sometimes be extended beyond the normal six year-limit. Contact CIE for more details on this exception.

Documentation

Before an H-1B employee may be employed, the following documentation is required (unless the employee has some other status which permits employment):

1. USCIS approval of a petition for a specific position at UTK. (I-797); a petition approval for another employer or a different UT position is not valid
2. I-94 showing valid, unexpired, H-1B status.

Exception: If the employee already holds H-1B status when petition has been received by USCIS, then he/she may usually begin or continue working at UT for 240 days. This applies even if the previous H-1B petition was approved for a different employer. Please consult CIE for more information about this provision.

Additional Employment

USCIS approval of a petition from UT authorizes **ONLY** employment by UT. If the employee wishes to accept employment or payment from another institution, the other employer must file a petition with USCIS. This includes short-term consulting or free-lance work performed as an independent contractor. It also includes honoraria from other universities or organizations. However, the employee may receive travel reimbursements from another institution, if related to his/her employment.

Please feel free to contact Elizabeth Smith or Scott Cantrell in the UT Center for International Education (865- 974-3177) if you have any questions about H-1B regulations, UT policies related to an H-1B petition, or the petition process. Please see separate [Instructions for Requesting an H-1B Petition](#) and the attached checklists for detailed information about the H-1B application process.